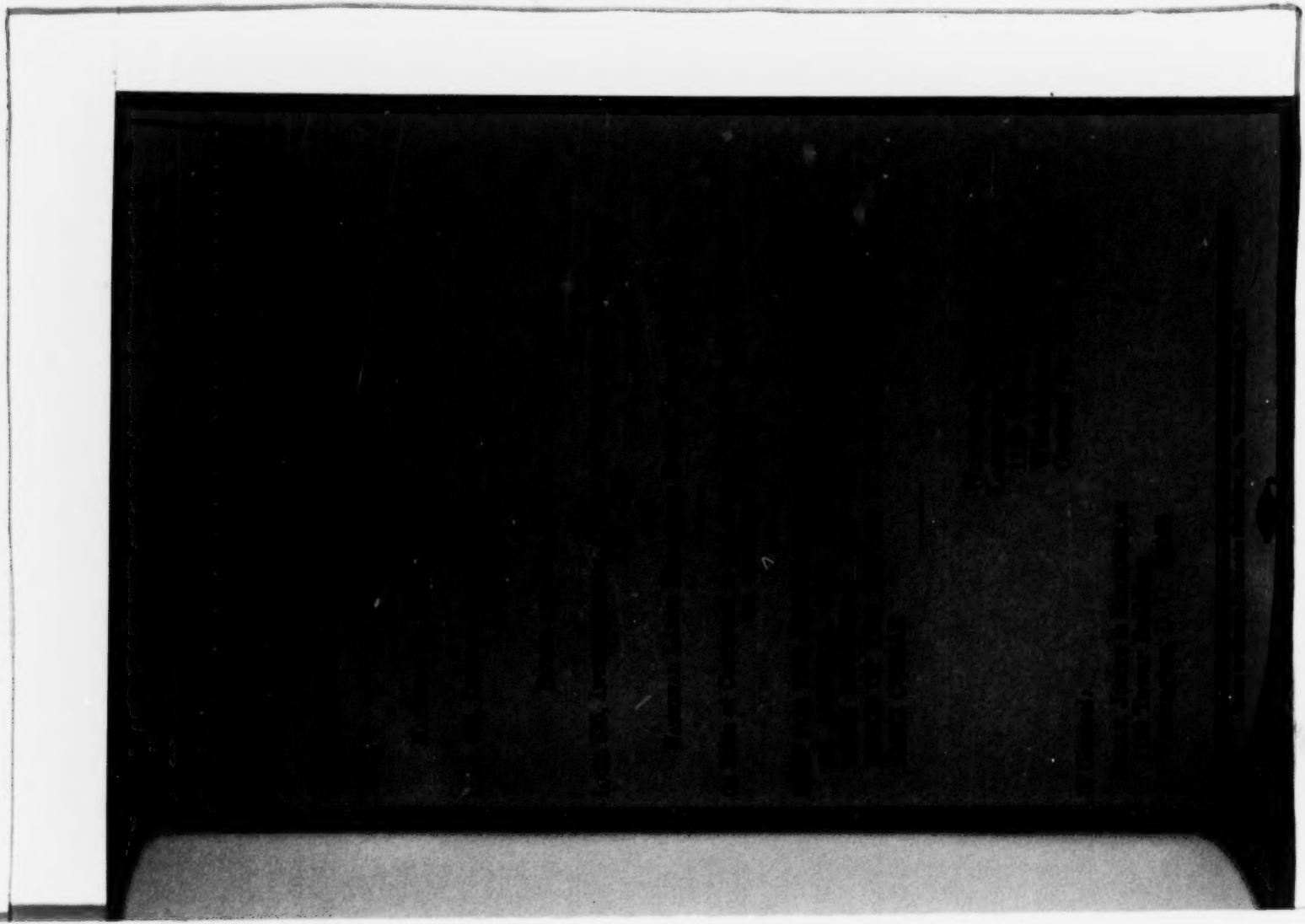

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STATUTES:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.):

Section 8(b)(4)(B) 1, 4, 6, 7, 8, 9, 10, 11, 12, 15

MISCELLANEOUS:

H. Conf. Rept. No. 510, 80th Cong., 1st Sess., p. 43 (*Legisl. Hist. 1947*, vol. 1, p. 547) 9

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Nos. 557 and 570

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, *Respondent*

and

BURNS AND ROE, INC., ET AL., *Petitioners*

v.

LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

and

NATIONAL LABOR RELATIONS BOARD, *Respondents*

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, THE NATIONAL ASSOCIATION OF HOME BUILDERS, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICI CURIAE

This brief on behalf of The Associated General Contractors of America, The National Association of Home Builders, and The Chamber of Commerce of the United State of America, as *amici curiae,* is filed pursuant to written consent of the parties under Rule 42(2) of

the Court. It is in support of the position of petitioners in these cases, namely, the National Labor Relations Board (herein called the Board) and Burns and Roe, Inc., *et al.*, that the United States Court of Appeals for the Third Circuit in the instant matter erroneously interpreted the provisions of Section 8(b)(4)(B) of the National Labor Relations Act (herein called the Act) in respect to the cease doing business requirement of the section.

I. THE INTERESTS OF THE AMICI CURIAE IN THESE CASES

Each *amicus curiae* participating in this joint brief has a substantial, though differing, interest in the subject matter of these cases. The interest of each will be set forth below.

A. The Associated General Contractors of America

The Associated General Contractors of America (herein called the AGC) is a national association representing approximately 9,000 general construction contractors throughout the country. The general construction industry as a whole employs approximately 4,500,000 workers and annually performs contracts in the amount of about $93,000,000,000. Based on a gross national production of $953,000,000,000 for 1969, this represents over 10 percent of the national production. Members of the AGC annually perform contracts in the amount of $75,000,000,000, or approximately 80 per cent of the construction in the industry. AGC members directly employ on their own payrolls approximately 1,000,000 workers.

Almost all of the contractors which are members of the AGC are affiliated with local chapters of the AGC.

There are 130 such chapters; in jurisdiction, statewide or metropolitan area. At least one such chapter exists in each of the 50 states. In addition to the approximately 9,000 general contractors which are members of the AGC and its local chapters, there are numerous non-general contractors—contractors in the mechanical, electrical or other specialized fields—which hold associate memberships in local chapters of the AGC but are not members of the national AGC.

The general contractor customarily is responsible for the performance of all work on construction projects. The general contractor arranges and coordinates the work among the various subcontractors so that construction proceeds upon an established schedule, and plans assignments so that each subcontractor's phase of construction is performed in proper sequence with the work of the other subcontractors and with the work performed by the general contractor through its own employees. The work of the various contractors on a construction project is interdependent to the extent that frequently work by some contractors cannot be undertaken until certain other stages of construction are in process or completed by other contractors. Consequently, a work stoppage by employees of one of the subcontractors on the project, or by employees of the general contractor itself, can and often does effectively halt construction throughout an entire project.

Frequently, the general contractor on a project retains part of the construction work and subcontracts the remainder, especially those parts of the work usually performed by so-called specialty or mechanical contractors. Among the work often retained by the general contractor is the general carpentry work on a project. The building industry is highly competitive

with the project contract frequently going to the general contractor who can perform the construction at the least cost. This often means going to the general contractor less apt to experience secondary boycott strikes and similar work stoppages such as occurred in this instant case.

In addition, the general contractor's bid on a project normally includes the estimated costs of specialty or mechanical contractors who usually do, and should, submit sub-bids with the expectation that they will be permitted to complete their work without involvement in the labor disputes of the other contractors on the project.

The latest annual report of the Board (Thirty-Third Annual Report) discloses that of the 5,846 unfair labor practice charges under Section 8(b) of the Act filed against unions in Fiscal Year 1968, 1,316, or 22 percent, alleged violations of Section 8(b)(4)(B), the secondary boycott section (see Table 2, p. 203). The report further shows that 744, or over 53 percent, of the Section 8(b)(4)(B) charges filed in Fiscal 1968 involved the construction industry (Table 5, p. 209; "CC" cases). It is plain, therefore, that AGC and its members have deep concern in the judicial interpretations placed on the secondary boycott provisions of the Act.

B. The National Association of Home Builders

The interest of The National Association of Home Builders (herein called NAHB) is similar to that of the AGC.

The NAHB is a national trade association of over 51,000 members affiliated with 481 local and state associations in each of the fifty states, Puerto Rico and the Virgin Islands. Its membership annually performs

the largest share of new residential construction throughout the United States. Residential building is the largest single segment of the construction industry. As such, the impact of new residential construction is a major force in, and spreads throughout, the entire American economic structure.

The residential construction industry is the prime consumer of hundreds of thousands of construction products, equipment, materials and supplies necessary to provide housing in sufficient quantity to satisfy the needs of the American home buyers. Similarly, the industry's nature is one of high competition and flexibility. The builder in the industry to be continually successful must be able to utilize new, and sometimes revolutionary, construction processes, materials and equipment to produce housing as a product competitive with others in the market.

This industry, which last year performed new residential construction valued at over 30 billion dollars and provided close to three million jobs, is extremely sensitive to any interpretation of the secondary boycott provisions of the Act which would extend the area in which employers in the industry could be drawn into labor disputes not their own.

C. The Chamber of Commerce of the United States of America

The Chamber of Commerce of the United States of America (herein called the C of C) is an organization comprised of over 3,800 local, state and regional chambers of commerce and trade and professional associations. These groups and associations, in turn, have an underlying membership of approximately 5,000,000 business firms and individuals. In addition, the C of C

has a direct membership in excess of 37,000 corporations, firms and individuals.

Members of the C of C are engaged in a wide variety of industrial and commercial activities. In the course of their business affairs these members often have found themselves involved one way or another in what has been held to have been an unlawful secondary boycott under Section 8(b)(4)(B) of the Act. The Chamber of Commerce and its members, therefore, likewise are very much interested in the proper interpretation of the secondary boycott section of the Act.

II. SUMMARY OF ARGUMENT

In failing to discern an unlawful objective in the union's coercion of a neutral employer to compel its assistance in the union's dispute with an employer with which the neutral did business, the court below improperly gave immunity to union conduct clearly designed to involve a secondary employer in a dispute not its own. The rule of law pronounced by the court was that where, despite its coercion of a secondary employer, a union's aims could be satisfied by something other than a total and permanent cessation of business between the secondary and primary employers, the union's objective falls short of the "cease doing business" object condemned by Section 8(b)(4)(B).

In attributing so strained and inflexible meaning to the terms "cease doing business," the court below apparently lost sight of the intent of Congress in enacting that section of the Act and the evils to which that section was addressed. Congress was concerned with preventing the spread of labor disputes to innocent third parties. Hence the purpose of the pro-

hibitions of Section 8(b)(4)(B) was to protect a neutral employer from becoming the target of a boycott simply because it did business with an employer at odds with the union and thus was in a position to assist the union in bringing economic pressure to bear on that employer. In view of Congress' intention to insulate the neutral employer from coercion designed to involve it in the labor disputes of another employer, it is immaterial whether a boycott is designed to effectuate a permanent disruption of the neutral's business relation with another or a lesser disruption. In either case section 8(b)(4)(B) is violated.

Although the opinion of the court below conveys the impression that the union's objective in the case at bar was something of a rarity in labor disputes, the type of boycott in which it engaged is a commonplace occurrence, which has been uniformly condemned by the Labor Board and courts other than the Third Circuit. The union sought to compel the general contractor to persuade a subcontractor to give in to union demands. Here, as in any dispute, the union's aim was to resolve its grievances against the offending employer on terms satisfactory to the union.

In such a case, so long as the primary employer succumbs to pressures by a secondary employer which are more subtle than a total rupture of their business relationship and thereby capitulates to the union's demands, the union may well be satisfied. But the unspoken premise in bringing pressure upon the primary employer through the neutral employer is that if the primary employer is unwilling to yield to the demands of the union, the coerced neutral employer would then terminate its business dealings with that employer and deal with someone more amenable to union demands.

Indeed, had the nonunion contractor in *Denver Building Trades* given in to the union and employed union labor, there would have been no reason for the neutral, the general contractor, to stop doing business with it. Yet the union's boycott of the general contractor would still have been for an object forbidden by the statute. Inasmuch as a union boycott of a neutral employer designed to have it influence the primary employer inevitably has as *an* objective the cessation of business between the two in the event the primary employer refuses to cooperate, such conduct constitutes a violation of Section 8(b)(4)(B).

III. ARGUMENT

A. Union Coercion of a Neutral Employer in Order To Affect His Business Relationship With a Third Party Constitutes a "Cease Doing Business" Objective in Violation of Section 8(b)(4)(B).

Unless we are prepared to return to virtually unrestricted boycotting of neutrals—despite the apprehension of Congress which gave rise in 1947 to the secondary boycott proscriptions of what is now Section 8(b)(4)(B)— the decision of the Court of Appeals for the Third Circuit cannot be permitted to stand. By holding that Section 8(b)(4)(B) applies only to boycotts designed to coerce a neutral employer into a total and permanent termination of his business relationship with the primary employer, the court below has given a blank check to unions to extend the area of their economic pressures.

The boycott of Burns and Roe involved a strike by union members against a neutral, not because of any complaint regarding its labor standards, but because it was dealing with a third party, White, against whom

the union had a grievance. It constituted an attempt to compel the economic assistance of a neutral in the fray, in an effort to force White to capitulate to the union in a matter between White and the union. The objective of a temporary disruption of the business relationship between the two employers during the course of the strike, as well as the objective of having Burns and Roe substitute a more compliant contractor in the event that White refused to submit to the union's demands, both violated section 8(b)(4)(B).

The court below acknowledged that there was "proof of coercive activity amounting to 'disruption of a business relationship' " with the primary employer and that the coercive activity was "aimed at causing a neutral employer to put pressure on the primary employer." By insisting that in addition to the "disruption of a business relationship" for the purposes shown, there be proof that the union wanted the neutral employer to make a permanent termination of his business relationship, the court clearly misconstrued the purpose of Section 8(b)(4)(B) and the nature of the evils it was designed to prevent.

The secondary boycott prohibitions of the Taft-Hartley Act were intended to interdict union boycotts which were directed to neutrals who had business dealings with an employer with whom the union had a dispute. The House Conference Report accompanying the Taft-Hartley legislation, H. R. Rep. No. 510, 80th Cong., 1st. Sess. p. 43, made clear that the "cease doing business" requirement was meant to have an expansive reach:

> "Thus it was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease

> doing business with employer B. Similarly it would not be lawful for a union to boycott employer A *because* employer A uses or otherwise deals in the goods of, or *does business with* employer B." (emphasis added)

The vice in the union's conduct here, as in any unlawful secondary boycott, it is that it sought to boycott a particular neutral employer merely because he did business with an employer upon whom the union wanted to bring pressure and hence was in a position to assist the union in effectuating its aims. As this Court has stated, an objective of Congress was that of "shielding unoffending employers and others from pressures in controversies not their own," *NLRB* v. *Denver Building Trades Council,* 341 U.S. 675, 692 (1951).

Accordingly, it is the union's use of the secondary employer as a pawn in the union's dispute with the primary employer that is forbidden by the statute. Among the abuses at which Section 8(b)(4)(B) was directed, as this Court noted in a related context in the *Tree Fruits* case, *NLRB* v. *Fruit and Vegetable Packers Local 760,* 377 U.S. 58, 64 (1964), was "forcing the secondary employer to cooperate with the union in its primary dispute." In the light of this concern of Congress, the "cease doing business" language of the section was intended to proscribe union coercion directed against a neutral employer because of a second employer, *viz,* union coercion of a neutral employer designed to affect his usual method of doing business with the primary employer.

The right of a neutral employer to remain uninvolved in the union's primary dispute was recognized

by this Court in the *Sand Door* case, *Local 1976 Carpenters Union* v. *NLRB*, 357 U.S. 93, 105 (1958):

> "Such a choice, free from the prohibited pressures—whether to refuse to deal with another or to maintain normal business relations on the ground that the labor dispute is no concern of his—must as a matter of federal policy be available to the secondary employer. . . ."

As that rule of law signifies, the decision as to whether it will "maintain normal business relations"—the contractual or other arrangements that it has made with the primary employer—free of any strings attached as a result of union coercion directed against it is the secondary employer's statutory right. Consequently, where coercion is used, it is immaterial whether the secondary employer is being forced by the union to break off its dealings entirely and permanently with the primary employer or only to cease doing business with him in their customary manner temporarily. In either case it is being compelled to disrupt its normal business relations because of the boycott, and the disruption—a cessation of doing business—is continued as long as the boycott remains in effect. This Court noted in *Local 761, IUE* v. *NLRB*, 366 U.S. 667, 672 (1961), that Section 8(b)(4)(B) was "directed toward what is known as the secondary boycott whose 'sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it'." By striking Burns and Roe the union plainly forced a labor dispute upon a third party who had a right to remain unconcerned and uninvolved.

B. Where, in the Absence of Compliance by the Primary Employer With the Union's Demands, the Union's Objective May Be Met by the Substitution of a Compliant Employer, The "Cease Doing Business" Object Is Satisfied.

Implicit in the lower court's decision is the notion that the union efforts in the instant case were an isolated kind of activity which, so the argument runs, managed to escape the attention of Congress when the secondary boycott prohibitions were enacted in 1947. The court below noted,

> "The language of Section 8(b)(4)(B) is apt to prohibit the classical secondary boycott where the attempt is made to coerce the primary employer by compelling others to stop trading or otherwise dealing with him. But we think the 'cease doing business' language is not apt to cover the objective proved here, however objectionable or deserving of condemnation it may be."

Far from being a unique or unusual phenomenon, and hence an isolated evil more likely to have escaped the attention of Congress, pressures of the type exerted here on the neutral employer in an effort to persuade him to make the primary contractor accommodate union demands are commonplace. Indeed, even a cursory examination of cases arising before the Labor Board reveals that union efforts similar to those in the case at bar have plagued employers not only in construction, but in manufacturing and service industries as well.

For example, in *NLRB* v. *Carpenters District Council,* 407 F.2d 804 (C.A. 5, 1969), the Carpenters Union struck the general contractor in order to have it influence a subcontractor to rehire laid off carpenters.[1]

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[1] It is worth noting that the court there referred to the case as presenting "a classic example of secondary coercion . . ." (407 F.2d at 806).

In *NLRB* v. *Local 3, IBEW,* 325 F.2d 561 (C.A. 2, 1963), enforcing 140 NLRB 729, the IBEW threatened to strike the New York Telephone Company unless it required a general contractor at work on one of its construction projects to assign certain conduit work to its members rather than those of another union. In *New York Mailers Union No. 6, ITU* v. *NLRB,* 316 F.2d 371 (CADC, 1963), the ITU attempted to prevent several New York newspapers from honoring their contracts for Sunday supplements printed at a struck plant. In *NLRB* v. *Milk Drivers Union Local 753,* 335 F.2d 326 (C.A. 7, 1964), the union struck a dairy in an effort to have it require a nonunion trucking company which transported its milk to hire members of the union. The list of similar cases could be extend without number.

The common thread of these cases is the union's effort to capitalize upon the business relationship between the secondary and primary employers under a current contract or agreement. In failing to discern a "cease doing business" object in the union's coercion of the secondary employer, Burns and Roe, the Third Circuit—unlike the Board and the courts in the cases cited above—shut its eyes to the economic realities of the business relationship between the two employers. In each of these cases the neutral employer, by virtue of being an owner, or general contractor, or having let the contract to the primary employer, was in a dominant position with respect to the primary employer.

The union, to be sure, may be satisfied temporarily with less than a permanent termination of business dealings between the neutral and the primary employer if the primary employer, under pressure from the neutral, ultimately accedes to the union's demands.

But the unspoken premise in bringing pressure to bear on the neutral is that if the primary employer is unwilling to accede to the union's demands, the neutral employer will terminate its relationship with the primary employer and substitute someone more tractable.

The court below, in focusing on what it viewed as a limited union aim, failed to recognize that except in the rare case where a union is committed to driving an employer out of business, its objective can be satisfied by something less than a total cessation of a neutral's business relationship with the offending employer. In the case at bar, the Operating Engineers' immediate aim was to have its members work on certain machinery. In the event the primary contractor, White, remained unyielding, the union's objective could be satisfied only by the termination of White's contract and his replacement by a more willing substitute.

There is, in our view, no meaningful distinction between this case and *NLRB* v. *Denver Building and Construction Trades Council,* 341 U.S. 675 (1951). There, as here, the union's aim was to have the subcontractor's work performed by union members. When the subcontractor refused to cooperate, the general contractor was picketed. Inasmuch as the union's goal was the employment of all union labor at the construction site, there is no reason to believe that its primary objective was to drive the nonunion subcontractor off the job. Had the subcontractor replaced its employees with union members—and thereby modified its arrangement with the general contractor which theretofore had permitted the employment of nonunion labor—the objective of having the general con-

tractor terminate the contract would not have been unmasked.[2] Yet as this Court recognized, 341 U.S., at 688, "The result is that the Council's strike, in order to attain its ultimate purpose, must have included among its objects that of forcing Doose and Lintner to terminate that subcontract." The same rationale is applicable here.

It is too well established for question that work stoppages instigated by a union contravene the Act if one of the objects of such activity is proscribed by Section 8(b)(4)(B), *NLRB* v. *Local 294, Teamsters,* 273 F.2d 696, 698 (C.A. 2, 1960); that is it not necessary to find that the sole object of a strike is an illegal one, *NLRB* v. *Denver Building Trades Council,* 341 U.S. 675, 689 (1951); and that it is not a defense that other motives may also have guided the union's activity, *NLRB* v. *Wine, Liquor and Distillery Workers Union,* 178 F.2d 584, 586 (C.A. 2, 1949); *Local 636, United Association* v. *NLRB.,* 278 F.2d 858, 864-865 (CADC, 1960). Since the immediate goal of the union was to deal with a subcontractor who would assign work in accordance with the union's demand, it is apparent that *an* object of its coercion of the general contractor (even if not the immediate object) was to compel the general contractor to deal with a subcontractor amenable to the union's wishes. In the event White refused to comply, the satisfaction of the

[2] A union agent had approached Gould, the subcontractor and told him that "he did not see how the job could proceed with Gould's nonunion men on it," and thereafter notified the general contractor that "union men could not work with nonunion men" (341 U.S., at 678, 679). There is no indication that, apart from the use of nonunion labor on the project, the union had any other immediate quarrel with Gould.

union's demands plainly required the cessation of all business with him and his replacement by another contractor.

IV. CONCLUSION

Accordingly, this Court should reverse the Court of Appeals insofar as it refused to enforce the Board's Section 8(b)(4)(B) findings and order and remand the matter for the entry of an order of enforcement.

Respectfully submitted,

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